

Before the  
Administrative Hearing Commission  
State of Missouri



STATE BOARD OF NURSING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10-2115 BN
	)	
KENNETH SHEPARD,	)	
	)	
Respondent.	)	

**DECISION ON REMAND**

Kenneth Shepard is subject to discipline.

**Procedure**

The State Board of Nursing (“the Board”) filed a complaint on November 12, 2010, seeking this Commission’s determination that there is cause to discipline Shepard’s license as a registered professional nurse (“RN”). Shepard was personally served with our notice of complaint/notice of hearing on April 5, 2011.

This Commission convened a hearing on the complaint on June 13, 2011 and December 19, 2011. Stephan Cotton Walker represented the Board. Shepard did not appear on the first date, but he appeared by telephone on December 19, 2011 and represented himself. We issued our decision with findings of fact and conclusions of law, finding no cause to discipline Shepard, on April 6, 2012.

The Board appealed our decision to the Cole County Circuit Court on May 2, 2012. The Court issued an order and judgment on February 19, 2013, in which it reversed and remanded our decision because it was “arbitrary, unlawful, unreasonable and not supported by substantial and competent evidence on the record as a whole.” After that order, the Board supplied the Court with proposed findings of fact and conclusions of law. The Court then issued findings of fact and conclusions of law on May 2, 2013, with instructions on remand for this Commission “to issue its Decision finding cause for the Missouri State Board of Nursing to discipline the registered professional nursing license of Respondent, Kenneth Shepard, pursuant to §§ 335.066.2(2) and (8) RSMo.” A copy of the Court’s decision was filed with this Commission on May 16, 2013.

On May 9, 2013, Shepard filed a letter addressed to the Judge Patricia Joyce, Angela S. Marmion,<sup>1</sup> the Board, and this Commission, protesting the procedure and the decision of the Court. On May 20, 2013, we held a conference call with Shepard and the Board’s attorney in which we stated that we would take no further action in this case until Shepard’s time to appeal the Court’s decision had run. That time has now passed, and we have no information indicating that Shepard filed an appeal of the Court’s decision. Therefore, the case is ready for our decision upon remand.

### **Discussion**

In approaching our task on remand, the circuit court’s mandate controls:

An appellate court’s mandate defines the scope of the trial court’s authority on remand. “The mandate serves the purpose of communicating the judgment to the lower court, and the opinion, which is a part thereof, serves an interpretive function.” The mandate is not to be read and applied in a vacuum. When determining its authority on remand, the trial court should be

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<sup>1</sup> Marmion represented the Board in its appeal to the Circuit Court.

guided by the mandate, but also by the opinion and result contemplated by the appellate court.

*Bryant v. Bryant*, 351 S.W.3d 681, 687 (Mo. App. E.D. 2011) (internal citations omitted).

The instructions we have been given on remand in the instant case are different than instructions we have received in other cases. In the past, we have typically been directed by the reviewing court to “reconsider” certain conclusions of law.<sup>2</sup> In this case, our instructions are very brief. We have been ordered “to issue [our] Decision finding cause for the Missouri State Board of Nursing to discipline the registered professional nursing license of Respondent, Kenneth Shepard, pursuant to §§ 335.066.2(2) and (8) RSMo.” We do so, therefore, without further analysis. In accordance with the judgment and instructions of the circuit court, we find that Shepard is subject to discipline under § 335.066.2(2) and (8), RSMo Supp. 2012.

### Summary

Shepard is subject to discipline under § 335.066.2(2) and (8).

SO ORDERED on July 17, 2013.

/s/ Karen A. Winn

KAREN A. WINN

Commissioner

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<sup>2</sup> See, e.g., *Amini v. State Bd. of Regis'n for the Healing Arts*, Order and Judgment, case no. 10AC-CC00087, November 16, 2010 (“[T]he AHC’s decision finding that the Board failed to offer any evidence of Petitioner’s conduct or course of conduct involving his patients or their care that would permit a finding of grounds for denial under Section 334.100.1(4) or (5) is unlawful and against the weight of the evidence on the record as a whole. Therefore, this Court orders AHC to reconsider its decision on these issues. If the AHC determines that grounds for denial under (4)(i) and/or (5) have been proven, it will then exercise its discretion as to whether to grant or deny Petitioner’s license”); *State Board of Nursing v. Kopesky*, Final Order and Judgment, case no. 04CV326216, April 5, 2005 (“the Court finds that the Commissioner erred in failing to apply Section 620.151, RSMo Supp. 2003 in that the statute is procedural and its application at the time of the hearing is not retroactive. The case is hereby remanded to Commissioner June Striegell [sic] Doughty for consideration of the facts applying Section 620.151, RSMo Supp 2003”); and *Complete Care of American & International v. Dep’t of Social Services, Div. of Medical Services and Dep’t of Health and Senior Services*, Order, case no. 2101CC-00689, July 15, 2003 (“The Court finds that the Commissioner did not adequately address the allegation of arbitrary and capricious conduct based upon duplicate sanctions for the same conduct nor did the Commissioner adequately address the rational [sic] of the appropriateness of the extent of the sanction to be imposed in light of the facts set forth in the regulation in Complete Care II. The Court, therefore, remands the consolidated files back to the Administrative Hearing Commission for further proceedings in order to determine whether, and to what extent, the claims representing the recoupment of \$57,104.24 are the claims purportedly falsified in Complete Care II and, then, provide a more specific basis for the criteria of sanctions being imposed as is reflected in Exh. AA (FL 307-308), attached hereto and made a part hereof.”)